

No. 16,184

IN THE

United States Court of Appeals
For the Ninth Circuit

ARTHUR KING WILSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

SPURGEON AVAKIAN,

J. RICHARD JOHNSTON,

H. HELMUT LORING,

First Western Building,

Oakland 12, California,

Attorneys for Appellant.

KOERNER, YOUNG, MCCOLLOCH & DEZENDORF,

Pacific Building, Portland 4, Oregon,

Of Counsel.

FILED

DEC 23 1958

PAUL P. O'BRIEN, CLERK



Subject Index

	Page
Statement of jurisdiction	1
Statement of the case	3
Specification of errors relied upon	15
Summary of argument	18
A. The lower court did not comply with the mandate....	18
B. The remand for reconsideration was itself improper...	19
C. The conviction is not supported by substantial evidence	20
D. Appellant should have been permitted to show his subsequent payment of the taxes	20
Argument	21
A. The lower court did not comply with the mandate of this court to reconsider the case and to make findings in the light of this court's opinion. (Specification of Errors Nos. 1 and 2.)	21
1. The Mandate called for reconsideration of the question of guilt	22
2. The mandate called for special findings	24
B. The remand for reconsideration, rather than retrial, was improper. (Specification of Error No. 3.).....	26
C. There is no substantial evidence to support the convic- tion. (Specification of Error No. 4.)	28
D. Appellant should have been permitted to show his continuous efforts to pay, and his subsequent payment of, the taxes in question. (Specification of Error No. 5)	36
Conclusion	36

Table of Authorities Cited

Cases	Pages
Bloch v. United States, 221 F.2d 786 (9th Cir. 1955)	27
Forster v. United States, 237 F.2d 617 (9th Cir. 1956)	27
United States v. Alker, F.2d (Sept. 10, 1958), 58-2 U.S.T.C. Par. 9829	27
United States v. Palermo, 259 F.2d 872 (October 2, 1958), 58-2 U.S.T.C. Par. 9850	27, 33
Wilson v. United States, 250 F.2d 312 (9th Cir. 1958)	27

Statutes

Internal Revenue Code of 1939:

Section 2707(b)	31
Section 2707(c)	2, 31
Section 1430 (26 U.S.C., Section 1430)	2
Section 1627 (26 U.S.C., Section 1627)	2

Internal Revenue Code of 1954:

Section 7215 (26 U.S.C., Section 7215)	35
Section 7512 (26 U.S.C., Section 7512)	35
18 U.S.C., Section 3231	3
28 U.S.C., Sections 1291, 1294	3

Rules

Federal Rules of Criminal Procedure:

Rule 18	3
Rule 23	4, 23, 24, 25
Rule 37(a)	3

Miscellaneous

H. R. 8865	35
S. R. 1182, 85th Congress, First Session, January 23, 1958	35
1958, U. S. Code Cong. & Adm. News, pp. 255, 257	35

No. 16,184

IN THE

**United States Court of Appeals
For the Ninth Circuit**

ARTHUR KING WILSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

STATEMENT OF JURISDICTION.

Following a remand by the Court of Appeals because of the District Court's application of an erroneous rule of law, the District Court held that it had in the first instance applied the correct law announced by the Court of Appeals and accordingly again found the defendant guilty (R. 78-82¹) and imposed the same sentence of eighteen months' imprisonment plus a \$5,000.00 fine (R. 82-4), without taking any further

¹The reference "R." is to the record on this appeal. The reference "O.R." is to the record on the first appeal, bearing Docket No. 15,301.

evidence² and without undertaking to redetermine appellant's guilt or innocence on the basis of the evidence offered at the trial. (R. 124, 121.)

In the original proceedings in the United States District Court for the Northern District of California, appellant was convicted, after a trial by the Court without a jury, of willfully attempting to defeat and evade the payment of Federal Income and Social Security taxes withheld from the wages of the employees of Coast Redwood Company, Inc., a corporation (of which appellant was the president), in violation of Section 2707(c) of the Internal Revenue Code of 1939, as made applicable by Sections 1430 and 1627 of said Code. (26 U.S.C., Sections 2707(c), 1430, 1627.) The indictment (O.R. 3-12) was in six counts. The first three related to the income tax withholdings for the second, third and fourth quarters of 1952; and the other three, to the Social Security tax withholdings for the same quarters. Appellant was found guilty on all six counts. Each count alleged that the willful attempt was made within the Northern District of California by the following means:

- (1) By failing and refusing to pay said withheld taxes;

- (2) By causing said corporation to fail and refuse to pay said taxes;

²The mandate on the former appeal authorized the Government to present further evidence, and gave appellant the right to respond to any new evidence produced by the Government (R. 36), but the Government elected not to introduce any further evidence (R. 79).

(3) By withdrawing and causing funds to be withdrawn from the bank accounts of said corporation for the personal use and benefit of appellant and of corporations owned and controlled by appellant and members of his family; and

(4) By causing said corporation to use its funds to pay creditors other than the United States.

The District Court had jurisdiction under 18 U.S.C., Section 3231, and Rule 18, Federal Rules of Criminal Procedure.

The judgment of the Court rendered on August 8, 1958, after the remand was the same as before, namely, that appellant pay a fine of \$5,000.00 on Count One of the indictment, and that he be imprisoned for a period of eighteen months on Count One and an additional period of eighteen months on each of Counts Two, Three, Four, Five, and Six to run concurrently with each other and with the sentence imposed on Count One. (R. 82-4, O.R. 65-7.) Notice of Appeal to this Court was filed on August 8, 1958. (R. 84-6.) The appeal was timely. Rule 37(a), Federal Rules of Criminal Procedure. This Court has jurisdiction to review the final judgment of the District Court. 28 U.S.C., Sections 1291, 1294.

STATEMENT OF THE CASE.

On the first appeal, this Court concluded that the trial judge had erroneously applied a rule of law

which did not require, for evasion of withholding taxes, the evil motivation which must be shown for evasion of income taxes.³

After appellee had urged, in its petition for rehearing, that at most "the case be remanded to the District Court for special findings pursuant to Rule 23 of the Federal Rules of Criminal Procedure rather than for a new trial,"⁴ the opinion was modified, and in accordance therewith the judgment as finally rendered was that the cause be

"remanded to the said District Court for reconsideration in accordance with the principles set forth in the opinion of this Court, and for further findings by the trial court, after the Government has introduced evidence, if any, and the defendant has been given the right to respond to any new evidence produced by the Government, if he so desires." (R. 37-8.)

The Government then filed in the District Court its proposed special findings, setting out at length the particular acts which it desired the Court to find were done with tax evasion motivation. (R. 40-59.) Appellant filed his objections to these proposed special findings and requested findings that his conduct was not motivated by tax evasion and that he was not guilty. (R. 59-78.)

³The Opinion of this Court is reproduced at R. 3-36. The original opinion is reported at 250 F.2d 312; and the denial of appellant's petition for rehearing, at 254 F.2d 391.

⁴The petition for rehearing has not been printed, but, pursuant to stipulation of the parties and Order of the Court (R. 150-1), is a part of the record on this appeal. The particular language quoted in the text appears at R. 133.

The matter was thereafter set for argument, which was heard on July 18, 1958. (R. 86-142.) At this argument, the District Judge raised the question as to what type of findings the Court of Appeals expected him to make (R. 119), and expressed the view that he should make only "the simple findings one way or the other as to whether or not the elements of the offense which the appellate court states to be necessary are present in this case or not." (R. 121; see also R. 120, 122, 125, 127, 135, 138.)

The District Court did not attempt to re-evaluate the evidence in the light of this Court's opinion. On the contrary, the trial judge said (R. 124):

"I could not and would not undertake to redetermine the guilt or innocence of the defendant on the record. I do not think that is what the Court of Appeals intended, and it would be an impossible task. No one could do that, no judge could do that."

Nor did the District Court make any special findings of fact. Instead, the trial judge said (R. 121):

"I would try my best to apply what I think is the opinion of the Court of Appeals here. I would find it impossible to make findings of fact two years after the event because, if the decision, the verdict of guilty, was based upon the Court's view as to the testimony of the witnesses and the records in the case at the time the evidence was furnished, I cannot, it is impossible for a court, any more than for a jury, to render a new decision on the same facts two years after the event. That is impossible and I wouldn't undertake to

do it, and, unless there is some new, revolutionary doctrine promulgated in this case, I couldn't do it."

The District Court made a finding that its "conception of the constituent elements of the offense" was the same as it had been at the time of the first judgment, namely, that there must be a showing that "the defendant wilfully and with the evil affirmative motive of tax evasion committed the acts charged in the indictment", and a finding that "the defendant wilfully and with the evil motive of tax evasion did commit said acts." (R. 82-3.)

Since appellant renews on this appeal his contention that there is no substantial evidence to support the conviction, a summary of the evidence is in order. Rather than repeat the lengthy statement of facts in our opening Brief for Appellant (pp. 3-19) in the prior appeal (Docket No. 15,301), we shall set forth herein verbatim the factual statement in the opinion of this Court on the former appeal (R. 5-15):

"This is a unique criminal case. There does not appear to be a single reported decision involving a felony prosecution for failure to pay withholding taxes. The instant case is not distinguished for that reason alone. It is unusual as well in that the acts alleged to constitute the necessary overt and objective element of the violation of Section 2707(c) do not conform to the tapestry and pattern of deception, concealment, and artifice ordinarily found in criminal tax evasion cases.

The evidence, largely uncontroverted, discloses that appellant organized and incorporated Coast

Redwood Co., Inc., in the State of California in May of 1945. It engaged in the logging and saw-mill business with operations centered in the redwood and fir forests of Northern California. The stock in the corporation was wholly owned by appellant and members of his family and he served actively as President from the date of incorporation. Coast Redwood Co. was one of several interrelated corporations owned entirely or substantially by appellant and members of his family and actively operated by appellant as President. Most of its business transactions and dealings were with these affiliated corporations. It functioned as a middle link in a vast chain of lumber enterprises whose activities extended from the acquisition of timber tracts to the sale of finished lumber. Two of these affiliated corporations, Union Bond and Trust Company and Ah Pah Redwood Company,⁴ owned or were purchasing the timber tracts upon which Coast Redwood Co. conducted its logging and cutting operations. Still another family corporation, A. K. Wilson Lumber Company, purchased rough lumber from Coast Redwood and remanufactured it into finished lumber for sale in the trade. In 1952 Coast Redwood sold all of its redwood log cants to A. K. Wilson Lumber Co.

Coast Redwood had originally been capitalized for \$5,000.00. It enjoyed success and prospered in the years preceding the indictment period and for that reason and perhaps also due in part to monies derived from an abortive sale of certain

⁴The Ah Pah Redwood Company was a wholly owned subsidiary of International Pulp & Paper Company. Appellant and his family owned all of the common stock and 20% of the preferred stock in the latter corporation.

assets of the corporation,⁵ Coast Redwood Company's capital at the end of the fiscal year on April 30, 1952, included earned surplus of \$306,433.04. This despite the fact that the corporation had encountered financial difficulties during that fiscal year and had incurred a net loss therein of \$274,323.95. Adversity continued to plague the corporation during the fiscal year ending April 30, 1953 (which included almost the entire period covered by the indictment), and it sustained a net loss of \$224,099.32. Part of this loss (the exact extent is vigorously disputed) was attributable to a summer fire which destroyed cut timber and hampered operations. As a result of its intensified financial plight, Coast Redwood Co. initiated proceedings under Chapter Eleven of the Bankruptcy Act on January 30, 1953. It was adjudicated a bankrupt on November 9, 1954.

A study of the past tax record of Coast Redwood Co. fails to reveal a portrait of a dutiful and diligent taxpayer. It had been delinquent in respect to meeting its obligation to pay over withheld income and Social Security taxes to the Government as long ago as 1947 and 1948. Again, at the start of the indictment period (namely, April 1, 1952), Coast Redwood Co. was delinquent in the payment of prior withholding taxes. Pursuant

⁵Early in 1951, appellant sold the sawmill and other assets of Coast Redwood Co. to a Mr. Hull, who paid appellant \$925,000 in cash prior to taking possession of the sawmill in April, 1951. Mr. Hull was unable to make the installment payments required by the agreement of sale and appellant resumed control of these assets in December, 1951. When questioned as to the disposition of the money received from Mr. Hull, appellant stated that it was used "to pay bills and get the property in shape where we could deliver it to Mr. Hull when the time came." [Tr. 668.]

to an understanding reached with the Internal Revenue Service, it was paying off these past obligations at the rate of \$1,000 per week. The sums paid during the indictment period were credited seriatim to the oldest outstanding obligation, in accordance with existing Internal Revenue Service policy where no instructions to the contrary are given. Neither Coast Redwood Co. nor appellant requested or instructed that the sums be applied in any different manner. Accordingly, the monies paid over to the Government during the indictment period, with the exception of the partial third quarter payment, served only to diminish prior obligations and not to pay current liabilities. However, it should be observed that payments made during each quarter of the indictment period and applied to accrued obligations did not in any instance equal or exceed the amount of money withheld and not paid over during that particular quarter.⁶

Appellant has resolutely maintained from the inception of the investigation into Coast Redwood Company's tax situation that the failure to pay the tax obligations on time was ascribable to the lack of sufficient funds. It was not that Coast Redwood Co. never had adequate funds to meet its tax obligations. The corporation's books and accounts completely refute such a contention. Coast Redwood Co. kept two bank accounts which during each month of the indictment period reached

⁶An aggregate amount of \$87,973.00 was paid over to the Collector of Internal Revenue during the indictment period, of which the sum of \$28,919.05 was applied, as noted previously, to the third quarter liability and the balance of which was credited to back taxes which accrued prior to the commencement of the indictment period.

substantial credit amounts, although, it must be added, the general over-all state of these accounts was one of constant overdraft.⁷ It was rather, appellant claims, that Coast Redwood Company's financial resources were so severely drained by the business setbacks it was experiencing in 1952, and it was so beset by other pressing obligations and impatient creditors that it was not possible to pay the Government in full if the corporation was to survive. Consequently, as appellant depicts the scene, Coast Redwood Co. was confronted with a continuing perplexing problem arising from the described predicament—who shall be paid and how much?

Appellant was chief executive officer of the corporation. It was his responsibility to determine how corporate funds should be expended. He was not himself the “disbursing officer” for the corporation, but he had the final word as to what bills should or should not be paid, and when. Possessed of such authority and power, he came within the purview of Section 2707(d) of the I.R.C. of 1939, which defines a “person” subject to the preceding subsections of §2707.⁸ Appellant asserts

⁷Coast Redwood Company's bank accounts can most accurately be characterized as active and fluctuating. The following example vividly illustrates the dynamic state of the corporation's bank accounts. Its commercial account at the Arcadia Branch of the Bank of America showed a balance of \$921.44 on August 8, 1952. The next day the balance was \$18,816.85. And on August 11, 1952, the account showed that \$20.76 was overdrawn.

⁸Section 2707(d) provides as follows:

“The term ‘person’ as used in this section includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee

that his choice was highly circumscribed. He says he could have paid the Government in full and neglected most of the other creditors entirely. Had he done this, appellant submits, Coast Redwood Co. would have been forced to shut down. He could have apportioned payments of available funds to various creditors, including the Government, and continued in business. Appellant states that he wanted to remain in business, expected and hoped to extricate Coast Redwood Co. from its embarrassed financial status, and planned to pay off all creditors in full. Of course, attainment of his related objectives lay with the latter alternative, which appellant therefore chose to pursue.

In order to stay in business, Coast Redwood Co., according to appellant, had to pay its current trade obligations such as payroll, suppliers, log haulers, insurance, and other similar operating expenses. Otherwise the necessary services rendered by this group of creditors would not have been forthcoming. Accordingly, appellant ordered that these obligations be accorded top priority. An Internal Revenue Service agent quoted appellant as later saying that he was in effect, robbing Peter to pay Paul and the United States was Peter in this instance. The agent testified that appellant also admitted that the Government rated a low priority. Appellant does not deny that the Government was not given first preference but urges in justification of his policy that he was at all

or member is under a duty to perform the act in respect of which the violation occurs."

Appellant does not contest on this appeal the sufficiency of the evidence to support a finding that this provision applies to him. Cf. *Levy v. United States*, 140 F. Supp. 834; *Cushman v. Wood*, 56-2 USTC 9690 (1956); *Wade v. United States*, 54-2 USTC 49,066 (1954).

times trying to do what he thought most likely to assure preservation of the corporation and eventual payment in full to all creditors, including the United States.

Wilson did not seek to conceal his policy or Coast Redwood Company's actual tax liability from the Government. Throughout the indictment period Coast Redwood Co., under appellant's stewardship, filed full, accurate and timely tax returns reflecting the amount of money owed. Appellant acknowledged, and never disclaimed, Coast Redwood Company's tax liabilities. He simply refused to direct their payment.

The operations of Coast Redwood Co. were considerable in scope and volume. During the indictment period its gross receipts totaled \$2,412,635.00 and its total disbursements amounted to \$2,414,263.00. As heretofore noted, Coast Redwood Company's business activities were conducted principally with affiliated corporations. Many of the expenditures and receipts during the nine-month period covered by the indictment involved these affiliates. The inter-corporate dealings and transfers of funds from one entity to another were numerous and complicated. Counsel for both sides devoted much attention and placed much emphasis upon whether these dealings and transfers constituted an affirmative attempt to siphon off available funds to affiliates, and were designed by appellant to evade and defeat the payment of the tax obligations. No useful purpose would be served by encumbering this opinion with compilations of these myriad transactions in light of our disposition of this appeal and the grounds therefor. It suffices to say that the original set of fig-

ures shows a net inflow to Coast Redwood from these dealings; the adjusted journal entries indicate a net outflow resulted from these transactions. A considered analysis of the evidence adduced on this point leads to the conclusion that while some dealings are questionable it does not appear that Coast Redwood Co. flagrantly favored, or was favored by, its affiliates. For example, while it is true that Coast Redwood Co. granted A. K. Wilson Lumber Co. a five per cent discount for non-existent brokerage fees on log cants sold to it, it is also true that Coast Redwood Co. purchased its stumpage at the same price paid by its affiliates to the timber tract owners.

Appellant supports various payments made to affiliates in preference to clearing up the tax obligations on the ground that these payments and in some instances, loans, were necessary to keep the other corporations solvent, and that in view of the interrelationship between his various corporations it was essential to Coast Redwood Company's continued existence that the affiliates remain in business. It should be noted here that the evidence fails to reveal any diversion of funds from the corporation directly to appellant or his family. Appellant drew no salary during the indictment period and the corporation never declared or paid a dividend in its ill-fated lifetime.⁹

⁹Two Coast Redwood Co. Checks were drawn to the order of appellant during the indictment period. The first was a \$1,000 check drawn in October, 1952, by an employee acting apparently without appellant's knowledge and consent. It was restored to Coast Redwood Co. the next month. The second was a \$19,000 check issued on November 28, 1952. The sum represented by this check wove a tortuous path through appellant's many corporate entities, but did not come to rest in his account. The sum was transferred to the account of

It should be noted also that appellant's version of Coast Redwood Company's dire financial condition and consequent dilemma, especially the assertion that preservation of the business rested on nonpayment of the tax liabilities, was challenged by the Government and apparently disbelieved by the court below. The District Court was seemingly of the opinion that appellant's explanatory statements, self-serving in character, were not persuasive because the tax obligations represented a mere pittance in the over-all financial dealings of the corporation. Of course, the trier of fact was free to discount appellant's testimony and no error was committed thereby. Appellant's defense has been here considered at length, not to permit an appellate tribunal to "second guess" a trial court on a factual issue, but to highlight the especial significance of the constituent mental element of the offense under the circumstances of the instant case.

Another facet of the instant fact situation deserves mention. Appellant and representatives of the Internal Revenue Service conferred from time to time during the indictment period regarding the matter of Coast Redwood Company's tax delinquencies. Invariably these conferences culminated in a promise by appellant that the corpo-

A. K. Wilson Lumber Co., which treated the transaction as a Transfer of funds from Coast Redwood Co. to Union Bond, and from Union Bond to A. K. Wilson Lumber Co.

The Government also sought to establish that appellant was depleting the funds of A. K. Wilson Lumber Co. and thus indirectly siphoning Coast Redwood Co. funds. The basic premise of the Government's charge is that funds were transferred from Coast Redwood Co. to A. K. Wilson Lumber Co. or A. K. Wilson Lumber Co. refused to pay its obligations to Coast Redwood Co. for tax evasion motives. Consequently, the textual discussion covers this point.

ration would, among other things, make regular installment payments of a certain sum or would settle its tax liabilities by a certain date. Just as invariably, for one reason or another, Coast Redwood Co. never fulfilled its undertakings. Nevertheless, the Internal Revenue Service acquiesced repeatedly in the delays and refrained from seizing the corporation's property in the hope that the business could be preserved; the same hope appellant urges was motivating him. Unfortunately, appellant's expectation proved groundless and his hopes were dashed. Coast Redwood Co. collapsed and was ultimately adjudicated a bankrupt. Had events taken a different turn, this case might not be before us."

SPECIFICATION OF ERRORS RELIED UPON.

1. The Court committed error in finding appellant guilty, in view of the Court's frank acknowledgment that it would be impossible to make a new determination of the guilt or innocence of the defendant on the basis of evidence heard and received two years earlier. (R. 75, 121, 124, 130, 140-2.)
2. The Court committed error in failing to accept the decision of the Court of Appeals that the trial Court had previously held an erroneous view of the law, and in again finding appellant guilty on the basis of the same view of the law as the trial Court had at the time of the first judgment. (R. 75, 78-82, 140-2.)
3. The Court committed error in undertaking to determine the guilt or innocence of appellant on the basis of the former record two years after hearing the

testimony and after having originally found appellant guilty on an erroneous theory of law. (R. 75, 78-82, 130-1, 140-2.)

4. The Court committed error in denying appellant's motion for acquittal as to each count, made at the close of appellee's case and also at the close of all the evidence. The ground on which the motions were made was that there was no substantial evidence to show the commission of any of the offenses charged in the indictment. (O.R. 539-40, 880-1.)

5. The Court committed error in sustaining the objection to appellant's offer to prove that in May, 1955, through his attorney, Mr. James Dezendorf, of Portland, Oregon, he held discussions with the representatives of the Internal Revenue Service in Portland, Oregon, including the District Director, relating to the Coast Redwood Company's withholding tax liabilities for the year 1952; that he was informed by the District Director that arrangements for the security and payment of those taxes could be made with the District Director's office in Portland; that he had checked with the District Director in San Francisco and had been so advised; that agreements were reached which were reduced to writing which provided in substance that the appellant would cause to have transferred to Mr. Dezendorf the title to various properties in which Coast Redwood Company had no interest; that Mr. Dezendorf would execute a mortgage to these properties which would provide that they were being held as security for the United States Government to secure all of the tax liabilities of the defend-

ant, A. K. Wilson, of members of his family and of all corporations controlled by A. K. Wilson or members of his family, including Coast Redwood Company; that an orderly liquidation of the mortgaged property would be made by means of sales, and upon the making of the sales the net proceeds from the sales would be paid to the District Director in Portland to be applied in liquidation of the tax liabilities secured; that thereafter following the execution and recordation of the mortgage mentioned, certain sales of property were held and proceeds in the amount of \$111,000.00 were delivered by Mr. Dezendorf to the District Director in Portland with the direction that they be applied to the Coast Redwood Company withholding tax liabilities for the year 1952; that thereafter Mr. Dezendorf, acting for appellant, arranged for the sale of certain other properties which were not covered by the mortgage and in which the Coast Redwood Company had no interest, and that the sum of \$103,000.00 was realized from the sale of that property and was delivered to the District Director in Portland with the direction to apply it to the Coast Redwood Company's withholding tax liabilities; that prior to the execution of the agreement with the District Director and the recordation of the mortgage in question, the District Director informed Mr. Dezendorf that before he could reach any agreement he would have to investigate the adequacy of the property as security for the total taxes in question; that thereafter he informed Mr. Dezendorf that he had made an appraisal of the property and was satisfied that it was more

than adequate to cover all of the taxes involved in the agreement. Objection to this offer of proof was made on the ground that it was immaterial and remote (O.R. 765, 773) and the further ground that the District Director in Portland had no authority to enter into such an agreement. (O.R. 773.) The objection was sustained on the specific ground that, assuming all the proposed matters of proof to be true, they were not material. (O.R. 774.)

SUMMARY OF ARGUMENT.

A. The Lower Court Did Not Comply With the Mandate.

The mandate of this Court called for a reconsideration of the evidence in the light of the correct rule of law as to the necessity for proof of evil intent, and for special findings of fact. Appellee so construed the mandate and presented its case accordingly. The language and context of the amendatory order of this Court, in modifying its original opinion, leave little room for contending otherwise.

The trial Court, however, held that a reconsideration of the evidence after two years was an impossible task which it would not undertake. As a result, it did not make a new determination of guilt or innocence, nor did it attempt to make any special findings. Instead, it made a finding that its view of the law had always been the same as that announced by the Court of Appeals, and on that basis it again found appellant guilty.

In effect, all that the trial Court did was to review (and disagree with) the Appellate Court's decision that the original judgment had been based on incorrect legal principles. That question was not open to consideration on the remand, and in any event the opinion on the prior appeal clearly shows that an incorrect rule of law was applied.

A redetermination of appellant's guilt or innocence, on the basis of a reappraisal of the evidence, which the remand contemplated, was not made.

B. The Remand for Reconsideration Was Itself Improper.

The proceedings on remand show that the Court should not have modified its original order for a retrial. The trial judge disagreed with the conclusions reached by this Court, he stated that his position was embarrassing and that he would have preferred an order for retrial, and he refused to reconsider the evidence and to make special findings on the ground that to do so was impossible.

As stated in the original opinion of this Court, the determination of factual questions on the basis of erroneous legal principles is just as erroneous when done by a judge as when done by a jury; and the error should in both situations be corrected in the same manner, namely, a retrial. A redetermination of factual questions two years after the trial does not protect the rights of defendants and imposes unfair and impossible burdens on those who are asked to reappraise and reweigh the evidence and decide what inferences to draw therefrom.

C. The Conviction Is Not Supported by Substantial Evidence.

There is no evidence of deceptive or fraudulent practices. Appellant was struggling with a practical situation. Coast Redwood was operating at a substantial loss, and its obligations to trade creditors were increasing even more than its withholding tax obligations. It was necessary to make payments to trade creditors for current purchases and services in order to keep going, and appellant's decision to do this was known to the Internal Revenue representatives and acquiesced in by them. If his judgment was bad, so was theirs; but such errors in judgment cannot support tax evasion convictions.

The new legislation enacted by Congress early in 1958, after the decision of this Court on the prior appeal, shows that Congress does not consider felony tax evasion prosecution the appropriate remedy for business decisions which are the result of economic hardship rather than fraudulent motivation. This legislation calls for specific personal notice to the responsible party of the delinquency in withholding tax payments, and provides that failure thereafter to deposit the withheld taxes immediately in a special account is a misdemeanor, regardless of whether or not funds are available.

D. Appellant Should Have Been Permitted to Show His Subsequent Payment of the Taxes.

There was a continuous course of conduct directed toward payment of the taxes in question, beginning in the indictment period and culminating in actual payment of the taxes out of funds in which Coast Red-

wood had no interest, after a security arrangement had been negotiated in 1955. Even though the security negotiations and the actual payment occurred two to three years after the liabilities arose, they had a bearing on appellant's good faith and lack of evil motive to evade payment, particularly since they were a part of a continuous course of conduct starting in 1952. The remoteness of time relates to the weight rather than to the relevance of this evidence.

ARGUMENT.

- A. THE LOWER COURT DID NOT COMPLY WITH THE MANDATE OF THIS COURT TO RECONSIDER THE CASE AND TO MAKE FINDINGS IN THE LIGHT OF THIS COURT'S OPINION.**
(Specification of Errors Nos. 1 and 2.)

The opinion of this Court on the former appeal clearly shows that the trial judge had found appellant guilty on an erroneous legal theory. The lengthy excerpts from the record cited in the opinion leave no possible doubt on this point. Nevertheless, the trial Court took the position, on the remand, that it had applied the correct rule of law in the first instance, and had never held any view of the law contrary to the principles announced by this Court. Accordingly, the trial Court said (R. 121-2):

“So that the record may be clear again, there is nothing new, in my opinion, in the statement of law as made in the Court of Appeals. I am not only bound by it, but I am in thorough agreement with it. I have never had any contrary views to that stated by the Court of Appeals with respect

to the necessity of tax evasion motive and wilfulness being present. Despite what is said in the Opinion, I never indicated anything to the contrary.’’⁵

The trial Court’s “reconsideration” of the case did not involve any reappraisal (or even attempted reappraisal) of the evidence, nor did the Court attempt to make any findings in the nature of special findings. It made only two “findings”, as follows: (1) that the trial Court’s conception of the constituent elements of the offense was the same as it had been at the time of the original judgment, namely, that a conviction required proof beyond reasonable doubt that appellant had wilfully and with the evil affirmative motive of tax evasion committed the acts charged in the indictment; and (2) that appellant “wilfully and with the evil motive of tax evasion did commit said acts.” (R. 81-2.)

As already stated, the trial Court specifically declared that a redetermination of appellant’s guilt or innocence was impossible. (R. 124, 121.)

1. The Mandate Called for Reconsideration of the Question of Guilt.

The original opinion of this Court called for a remand of the case for a new trial. (R. 35.) Appellee’s Petition for Rehearing En Banc (not printed) asked the Court to affirm the conviction or, in the alternative, to remand the case “for special findings pursu-

⁵This statement cannot be reconciled with the remarks of the trial Court quoted in footnote 13 of this Court’s Opinion (R. 25-30).

ant to Rule 23 of the Federal Rules of Criminal Procedure rather than for a new trial'' (p. 11.) After pointing out that the trial had consumed nine days, appellee stated (Petition for Rehearing, p. 11):

''To require retrial solely for the purpose of affording the trial court an opportunity to reappraise the evidence in the light of the standard of law as enunciated in this Court's opinion would entail unnecessary expenditure of time and money. There being no other error, it is manifest that the trial court *having the record before it* could readily make such special findings under Rule 23 as may be necessary to clarify the factual basis upon which he determined the existence of appellant's specific wilful intent to evade payment of the withheld taxes.'' (Italics added.)

The Court then amended its opinion to provide for a remand to the District Court ''for reconsideration in accordance with the principles set forth in this opinion and for further findings . . .'' (R. 36.)

We think it is clear that the mandate called for a reconsideration of the evidence and a new look at the question of guilt or innocence, all in the light of the correct rule of law announced by this Court.

Appellee itself obviously interpreted the mandate as calling for reconsideration of the evidence, since it submitted, on its own initiative, lengthy proposed special findings (R. 40-59) which contain numerous detailed references to the testimony.

Furthermore, at the outset of the remand hearing, appellee's counsel stated that the trial Court

“. . . is under instructions from the Court of Appeals to reconsider the evidence in this case for the purpose of making findings. . . .” (R. 87.)

Similarly, counsel said that the facts had to be reviewed to see whether or not they make out the requisite state of mind (R. 90), and he argued the evidence at length. (R. 90-9.)

After the trial Court had stated that “. . . it is impossible for a court, any more than for a jury, to render a new decision on the same facts two years after the event” (R. 121), appellee’s counsel expressed the assurance that the Court was still sufficiently familiar with the facts (R. 122-3) and urged the Court to relate its finding, “whatever it might be . . . to certain of the significant pieces of evidence in the case upon which the finding is based.” (R. 124.)

The judgment of guilt without a reappraisal of the evidence violates the premise upon which appellee persuaded this Court to modify its remand, namely, that the trial Court’s familiarity with the record made the time and expense of a new trial unnecessary.

2. The Mandate Called for Special Findings.

Appellee’s Petition for Rehearing En Banc, in urging a remand for reconsideration rather than for retrial, stated (p. 11) that “. . . the trial court having the record before it could readily make such special findings under Rule 23 as may be necessary to clarify the factual basis upon which he determined the existence of appellant’s specific wilful intent to evade payment of the withheld taxes.”

This was an unambiguous and unequivocal request for a remand for special findings; and, in the context and posture of the case, we think the Court's modification of its opinion similarly called for special findings to be made.

Appellee proposed special findings before the lower court after the remand (R. 40-59), as did appellant. (R. 59-78.)

Even after the lower court had expressed the view that the mandate did not call for special findings and that it would be impossible to make them (R. 121, 124, 131, 132, 135), counsel for appellee expressed the view that the Court of Appeals had, in effect, made a motion for special findings under Rule 23 on behalf of appellant (R. 126), urged the Court to make special findings (R. 124), and specifically stated that in appellee's opinion "*. . . it was the contemplation of the Court that the special findings should be made whether or not new evidence was introduced.*" (R. 134, italics added.)

Appellant urged upon the lower court the view that the mandate called for findings which set forth the particular acts considered to be the tax evasion conduct and stated whether those acts were done with or without the requisite evil intent. (R. 130.) The trial Court took the view, however, that what this Court wanted was not so much a finding as to the appellant's conduct as a finding as to the state of mind of the trial Court regarding the applicable law. (See the Opinion, Findings and Decision of the lower court, R.

78-82, as well as the remarks of the Court during the remand hearing, R. 131.)

B. THE REMAND FOR RECONSIDERATION, RATHER THAN RETRIAL, WAS IMPROPER. (Specification of Error No. 3.)

We have previously presented this point to the Court, in our Petition for Rehearing and Petition for Recall of Mandate and For Leave to File Petition for Rehearing, in No. 15,301, and ordinarily we would be reluctant to argue the point again. The proceedings on the remand in this case however, illustrate the problems created by such a remand so graphically that we believe further discussion is in order.

First of all, the trial judge rejected this Court's conclusion that an erroneous rule of law had been applied. This is apparent not only from the trial Court's written Opinion, Findings, and Decision (R. 78-82), but from numerous statements made by the Court during the course of the remand hearing. (R. 121-2, 131, 138.)

Secondly, the trial Court found its position on the remand an embarrassing one, and expressed the wish that the Court of Appeals had ordered a retrial. (R. 131.) The determination of criminal guilt or innocence should be divorced from factors of personal embarrassment, and this should be just as true of a judge passing on factual issues as it is of a jury.

Finally, the trial Court declared a reconsideration of the evidence impossible, as already shown at length earlier in this brief. Thus, what we had feared has

fully materialized; and, through the frankness of the trial judge in recognizing and acknowledging the situation, we know that there was no reconsideration of the case, and no reappraisal of the evidence. What was intended by this Court to be a redetermination of the guilt or innocence of the appellant became instead a review of the conclusions reached by this Court.

Accordingly, without repeating herein the arguments and authorities set forth in our Petition for Rehearing in No. 15,301, we urge the Court to reconsider the propriety of the type of remand made here.

We also call attention to the Third Circuit's recent treatment of a similar problem in *United States v. Palermo*, 259 F.2d 872 (October 2, 1958), 58-2 U.S.T.C. Par. 9850. The defendant had been found guilty by the Court, in a non-jury trial, on two misdemeanor counts of wilful failure to pay his income taxes. Relying largely on the Ninth Circuit's holdings in *Bloch v. United States*, 221 F.2d 786 (9th Cir. 1955), *Forster v. United States*, 237 F.2d 617 (9th Cir. 1956), and the instant case (*Wilson v. United States*, 250 F.2d 312 (9th Cir. 1958)), the Third Circuit held that the trial judge had applied the wrong standard of wilfulness and remanded the case, for retrial as to one count and dismissal as to the other.

In another recent case, the Third Circuit expressed grave concern over a two months' interruption in a jury trial brought about by the defendant's health. *United States v. Alker*, F.2d (Sept. 10, 1958), 58-2 U.S.T.C. Par. 9829. The Court, raising the question on its own initiative, deemed it appropriate to

frown on this practice as “hardly . . . commensurate with the minimal standards required for the efficient administration of justice.” Since appellant had requested the continuance and was not claiming prejudice from it, there was no reversible error, but the Court admonished that in such situations the Court should avoid long interruptions by either forcing the defendant’s presence through revocation of bail or declaring a mistrial.

The same concern applies here. In effect, there was a delay of two years while the correct rule of law to be applied was determined, and the trial Court was then asked to reconsider the case on the evidence previously taken. Since the trial judge said this was an impossible task which he would not undertake, the practicability and fairness of such a project has become wholly theoretical in this case. Nevertheless, we submit that even from purely a conceptual approach, a partial remand of this kind presents grave risks to accurate and objective appraisal of testimony by the trier of facts.

C. THERE IS NO SUBSTANTIAL EVIDENCE TO SUPPORT THE CONVICTION. (Specification of Error No. 4.)

We respectfully submit that the most careful reading of the record fails to show any substantial evidentiary basis for the conclusion that appellant engaged in acts motivated by tax evasion. Not only is there a complete absence of any concealment or deception, but there is on the contrary a record of full and honest disclosure of the tax liabilities, and of continuous con-

temporaneous discussion with the Internal Revenue representatives of the financial problems of Coast Redwood and of the means by which appellant hoped to resolve them. The Internal Revenue representatives knew what he was doing, and they acquiesced in his conduct because of their own belief that this conduct would be preferable to shutting down the business through their exercise of the warrants for distraint which they held.

Had the Court made special findings, the pertinent facts could have been related to each finding to test the sufficiency of the evidence. Since the Court made only a general finding, we have no way of determining what particular acts the Court considered to be the means of the attempted evasion, nor do we know what evidence was the basis for determining that the conduct was motivated by the desire to evade payment of the taxes.

In its opinion on the prior appeal, this Court said (R. 33) that all of the following possibilities existed, and that a verdict following any of them would be sustained if based on the correct rule of law: (a) appellant directed the disbursements in good faith and solely to preserve the business, or he acted in part to evade or defeat payment of the taxes; (b) the disbursements were not made with intent to evade, but the failure to pay was motivated by a desire to evade payment, in which case appellant would be guilty only of a misdemeanor (rather than the felony for which he was tried); (c) appellant did not commit any crime, and could be held liable only civilly.

This statement was by way of dictum and does not, of course, constitute a holding. It was placed in the opinion to illustrate the importance of applying the correct rules of law in weighing the evidence. Had there been a retrial, as first ordered, this observation of the Court would not have had any significance in the subsequent proceedings. Appellee will no doubt contend, however, that this statement is for practical purposes a holding that the evidence is sufficient; and for that reason we present some further argument instead of simply directing the Court's attention to the briefs filed on the first appeal.

One factual matter which was not before this Court on the prior appeal but which has been included in this record is that appellant had in fact been negotiating for a sale of Coast Redwood's properties during the fall of 1952, just as he had stated to the Internal Revenue Service representatives when asking for additional time to pay the delinquencies. One of the special findings proposed by appellee on the remand was that appellant had made misleading statements to the Internal Revenue Service representatives to the effect that he was negotiating for a loan or sale of properties. (R. 49-50.) In objecting to such a finding on the ground there was no evidence to support it (R. 63-4), appellant attached a verbatim transcript (R. 76-8) of that portion of the proceedings at the time of the original sentencing which showed that the trial judge was satisfied from the pre-sentence investigation that such negotiations had in fact been carried on extensively.

We mention this because it clearly eliminates any basis for contending that at the time of the remand the Court considered any such alleged "misrepresentations" as the tax evasion conduct.

Similarly, both the lower court and the prosecutor specifically renounced any thought that the failure to live up to the agreement of August 28, 1952, could be a basis for conviction. (O.R. 329.)

As the opinion on the prior appeal states (R. 5), the facts of this case "do not conform to the tapestry and pattern of deception, concealment, and artifice ordinarily found in criminal tax evasion cases."

The indictment (O.R. 3-12) alleged that the attempt to evade was made by the following means:

(1) By failing and refusing to pay said withheld taxes;

(2) By causing said corporation to fail and refuse to pay said taxes;

(3) By withdrawing and causing funds to be withdrawn from the bank accounts of said corporation for the personal use and benefit of appellant and of corporations owned and controlled by appellant and members of his family; and

(4) By causing said corporation to use its funds to pay creditors other than the United States.

The first and second of these, even if done with the necessary evil intent, would at most establish only the misdemeanor proscribed by Section 2707(b) of the Internal Revenue Code of 1939, not the 2707(c) felony alleged in the indictment.

The other two means alleged in the indictment simply are not supported by evidence showing either the factual assumptions of the indictment or the existence of any evil intent. In its prior consideration of the case, this Court concluded that

“... the evidence fails to reveal any diversion of funds from the corporation directly to appellant or his family” (R. 13);

and that

“... it does not appear that Coast Redwood Co. flagrantly favored, or was favored by its affiliates” (R. 12.)

The Court's opinion also recognized that, in order to stay in business, Coast Redwood had to pay its current trade obligations, and that appellant accorded them top priority. (R. 11.) It may be added that this was done with the contemporaneous knowledge and acquiescence of the Internal Revenue collection representatives (O.R. 848) and therefore cannot be considered a deceptive or fraudulent practice. It was simply a judgment decision shared by the collection officers.

Moreover, the payments to trade creditors during the indictment period were less than the value of the goods and services obtained from them. The total obligations to the various classes of trade creditors increased by \$93,474.95 between April 1 and December 31, 1952 (O.R. 339-42); and this was in addition to the increase in stumpage liability to affiliates in the net amount of \$45,191.00. (O.R. 307.)

We have not repeated here the detailed discussion of the evidence set forth in our opening and reply briefs on the prior appeal, particularly since the Court's opinion summarizes the facts in considerable detail.

The Court's attention is, however, directed particularly to one facet of the case not previously discussed, in the light of the recent decision in *United States v. Palermo*, 259 F.2d 872 (Oct. 2, 1958), 58-2 U.S.T.C. Par. 9850. The defendant there was convicted in a non-jury trial on two counts of wilful failure to pay delinquent income taxes. In setting aside the conviction because of the application of erroneous legal principles relating to wilfulness, the Court directed a retrial as to one year only, and ordered a dismissal as to the other. The reason for the dismissal was that, in the year involved, the defendant had paid on delinquent accounts from prior years substantially more than the current year's unpaid liability. Accordingly, the Court held that there could be no substantial basis for finding wilfulness as to that year, notwithstanding evidence of lavish personal expenditures.

The situation here is quite similar, except that appellant was not living lavishly and was not drawing even a salary from Coast Redwood. The withholding tax payroll deductions for the third and fourth quarters of 1952 were not greatly in excess of the payments actually made, although the bulk of the payments were, by agreement, credited to prior delinquencies. The following table shows the total deductions and

the amounts paid (or set aside in a special account and subsequently paid over) for each quarter:

Period	Total Deductions	Amount Paid or Set Aside
2nd Quarter, 1952	\$ 55,473.17	\$14,054.42
3rd Quarter, 1952	48,332.32	41,419.05 ⁶
4th Quarter, 1952	43,193.07	42,500.00 ⁷
	<hr/> \$146,998.56	<hr/> \$97,973.47

The payments during the second quarter of 1952 were far below the payroll deductions, but it may be noted that the conduct principally relied upon by appellee occurred during the third and fourth quarters. Thus, in the proposed special findings submitted by appellee, in the section entitled "The Affirmative Acts Involved in the Offense of Wilful Attempt to Evade or Defeat Payment of Taxes" (R. 47-54), the earliest date of any of the alleged acts is July, 1952 (except for the general allegations which describe the total amount of inter-company transactions by reference to the entire period.)

This Court's conclusion that evil motivation is required to make out the felony of evasion of payment of withholding taxes is reinforced by subsequent Con-

⁶Includes \$28,919.05 which was set aside in a special bank account and paid with the 3rd quarter return when it was filed on October 31, 1952.

⁷Includes four weekly payments of \$2,500.00 made in January, 1953. Two of these checks, totalling \$5,000.00, did not clear Coast Redwood's account prior to the commencement of the Chapter 11 proceedings, and accordingly were not honored by the bank. (O.R. 797-8.)

gressional legislation. Following the original decision in this case, Congress enacted H.R. 8865 (signed by the President on February 11, 1958), which added Sections 7215 and 7512 of the Internal Revenue Code of 1954 (U. S. Code, Title 26, Sections 7215 and 7512.) These sections provide, in substance, that when there is a delinquency in payment of withholding taxes, the responsible party may be notified personally of the delinquency, and thereafter he must deposit the withheld taxes in a special account not later than the second banking day after the payroll deduction is made. Failure to do so is a *misdemeanor*, and a lack of funds immediately after the payroll payment is not a defense.

The Senate Report on H.R. 8865 states that the felony tax evasion provision is not an appropriate or adequate enforcement aid because the Courts "generally have refused to treat as 'wilful' those cases where the employer failed to pay over amounts withheld because they used the funds in business ventures which were not successful and no longer had such amounts available to be paid over to the Government." S.R. 1182, 85th Congress, First Session, January 23, 1958; 1958, U. S. Code Cong. & Adm. News, pp. 255, 257.

Thus, when confronted specifically with the type of problem which this case exemplifies, Congress felt that there should be no criminal offense at all without a prior warning notice, and even then felt that non-compliance with the notice should be a misdemeanor rather than a felony. Had this new legislation been

in effect in 1952, the Internal Revenue authorities would undoubtedly have utilized it. But the delay in formulating an appropriate enforcement provision does not justify a tortured view of the facts so as to make criminal wilfulness out of what is essentially nothing more than economic hardship.

D. APPELLANT SHOULD HAVE BEEN PERMITTED TO SHOW HIS CONTINUOUS EFFORTS TO PAY, AND HIS SUBSEQUENT PAYMENT OF, THE TAXES IN QUESTION. (Specification of Error No. 5.)

We refer the Court to the argument on this point in our Brief for Appellant (pp. 36-8) in the prior appeal. (On that appeal, the Court concluded that the exclusion of the details of the negotiations, as distinguished from the fact thereof, was not an abuse of discretion.)

CONCLUSION.

The failure to comply with the mandate of this Court requires that the case again be remanded. In view of the trial judge's statement that reconsideration of the trial evidence is impossible because of the passage of time, it would be pointless to send the case back for that purpose. The case should be remanded, therefore, for either retrial or acquittal. There is no substantial evidence to show a wilful attempt to evade payment of the taxes, and presumably no further proof exists, since appellee did not utilize its

opportunity to present further evidence at the remand hearing. Accordingly, a dismissal should be ordered.

Dated, Oakland, California,
December 15, 1958.

Respectfully submitted,

SPURGEON AVAKIAN,

J. RICHARD JOHNSTON,

H. HELMUT LORING,

Attorneys for Appellant.

KOERNER, YOUNG, MCCOLLOCH & DEZENDORF,
Of Counsel.

(Appendix Follows.)

Appendix.



Appendix Re Exhibits

(page references are to Original Record
on prior appeal, No. 15,301)

Exhibit No.	Identified	Offered	Received	Rejected
1	106	107	107	
2	106	107	107	
3	111	111	111	
4	111	111	111	
5	112	112	112	
6	112	112	112	
7	129	129	129	
8	144	144	144	
9	145	145	145	
10	145	145	145	
11	151	151	151	
12	168	172	172	
13	170	172	172	
14	170	172	172	
15	180	180	180	
16	198	198	198	
17	207	207	207	
18	210	210	210	
19	216	216	216	
20	219	219	219	
21	226	226	226	
22	229	229	229	
23	230	230	230	
24	231	231	231	
25	234	234	234	
26	234	235	235	
27	236	236	236	
28	236	236	236	
29	238	239	239	
30	240	240	240	
31	243	243	243	
32	244	244	244	
33	266	266	266	
34	268	268	268	

Exhibit No.	Identified	Offered	Received	Rejected
35	277	277	277	
36	281			
37	281	281	281	
38	361	361	361	
39	384	384	384	
40	385	385	385	
41	387	387	387	
42	388	388	388	
43	389	390		
43A	406	405	406	
43B	406	405	406	529
44	473	477	478	
45	473	477	478	
46	474	477		
47	476	477		
48	519			
49	666	666	666	
50	830	830	830	
51	850	850	850	
52	871	871	871	
A	492	491	492	
B	494	494, 503		506
C	617	618	618	
D	730	739		739
E	759	759	759	
F	776	776	776	
G	781	781	781	
H	784	783	784	
I	784	784	784	
J	784	784	784	
K	784	784	784	
L	785	785	785	
M	792	792	792	